Mak Weng Kit v Reed Exhibitions Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-7 OF 1998
KC VOHRAH J
8 DECEMBER 1999

Administrative Law *— Exercise of judicial functions — Judicial review — Findings of facts of Industrial Court based on credibility of witnesses — Whether findings can be impugned in judicial review in certiorari proceedings —Whether Industrial Court was irrational in its findings*

Labour Law *— Employment — Re-assignment — Whether demotion — Whether claimant was constructively dismissed*

The applicant ('the claimant') claimed constructive dismissal when he was re-assigned from his position as country manager to that as International Sales Force (ISF) area manager by the respondent ('the company') with effect from 24 January 1996. He claimed that the re-assignment was a demotion. The Industrial Court in its Award No 599 of 1997 held that the re-assignment of the position of the claimant as country manager to ISF area manager was not a demotion and that therefore the claim of constructive dismissal failed.

The claimant argued, inter alia, that: (i) the Industrial Court was irrational in its finding when it held on the one hand that the employer has the prerogative to transfer the employer from one post to another and yet on the other hand went on to state that the claimant did not plead that the company did not have the contractual right to transfer him or to reassign him to different function; (ii) the Industrial Court had committed 'an error of fact' when it held that the claimant was only told to 'liaise' with the general manager contrary to the documentary evidence adduced in the court which showed that the claimant was 'to report' to the general manager; (iii) the Industrial Court misconstrued the ratio decidendi in the case of *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137 on statutory unjust dismissal as opposed to common law constructive dismissal; and (iv) that the Industrial Court had asked itself the wrong question when it held that the court is of the considered opinion that the designation of the claimant to the new post was proper, done bona fide as a result of a proposed reorganization when such intentions are irrelevant at law.

Held:

(1) It was merely a statement of fact by the Industrial Court that the challenge was not to the contractual right of the company to transfer the claimant but to his re-assignment being a demotion and taken contextually there is clearly no irrationality at all (see p 720A–B). What matters is that the Industrial Court was seized of the pivotal issue in the case — whether the re-assignment was a demotion and therefore, in the circumstances of the case, the claimant was constructively dismissed (see p 720E).

(2) The Industrial Court came to a finding of fact that the claimant was only required to liaise with the general manager after hearing the evidence of the president of the company who wrote the letter which the claimant had relied in the context of other evidence. Where the Industrial Court has made findings of facts based on the credibility of witnesses it saw and heard, such findings of facts cannot be impugned in the judicial review in certiorari proceedings (see p 721B–C).

(3) The material facts of the Court of Appeal in *Ang Beng Teik* themselves were not concerned with 'constructive dismissal' but with 'termination'. The Court of Appeal's statements on constructive dismissal are not really part of the ratio decidendi of the case. Thus, the Industrial Court therefore cannot be said to have 'misconstrued the ratio decidendi' of *Ang Beng Teik* (see p 722A–C).

(4) The claimant himself did allege that the re-assignment was as a result of the company's loss of confidence in him. He claims that he was reassigned not because there was a reorganization exercise. The court's finding that the designation of the claimant to the new post was proper, done bona fide as a result of a proposed reorganization, was an answer to that and, while it was not in issue, the court's finding did not detract from the central finding that the claimant was not demoted (see p 722G–H).

[Bahasa Malaysia summary

Pemohon ('pihak menuntut') telah mendakwa berlakunya pemecatan konstruktif apabila beliau telah diberi tugas lain daripada jawatan beliau sebagai pengurus negara kepada pengurus kawasan Pasukan Jualan Antarabangsa ('ISF') oleh responden ('syarikat tersebut') yang mula berkuat kuasa daripada 24 Januari 1996. Beliau mendakwa bahawa penugasan semula tersebut merupakan satu penurunan pangkat. Mahkamah Perusahaan di dalam Award No 599 tahun 1997 memutuskan bahawa penugasan semula jawatan pihak menuntut sebagai pengurus negara kepada pengurus kawasan ISF bukan satu penurunan pangkat dan bahawa oleh demikian tuntutan pemecatan konstruktif gagal.

Pemohon telah menghujahkan, antara lain, bahawa: (i) Mahkamah Perusahaan tidak rasional di dalam penemuannya apabila memutuskan di satu pihak bahawa majikan mempunyai prerogatif untuk memindahkan pekerja tersebut daripada satu jawatan ke satu jawatan yang lain dan sebaliknya menyatakan seterusnya bahawa pihak menuntut tidak membuat rayuan tentang syarikat tersebut tidak mempunyai hak kontraktual untuk memindahkan atau menugaskan semula beliau kepada fungsi kerja yang lain; (ii) Mahkamah Perusahaan telah melakukan 'kesilapan pada fakta' apabila memutuskan bahawa pihak menuntut telah hanya diberitahu untuk 'berhubungan' dengan pengurus besar bertentangan dengan keterangan dokumentar yang telah dikemukakan di mahkamah yang

menunjukkan bahawa pihak menuntut sepatutnya 'melaporkan diri' kepada pengurus besar; (iii) Mahkamah Perusahaan telah menyalahtafsirkan ratio decidendi di dalam kes *Ang Beng Teik v Pan Global TextileBhd, Penang* [1996] 3 MLJ 137 tentang pemecatan statutori yang tidak adil bertentangan dengan pemecatan konstruktif common law; dan (iv) bahawa Mahkamah Perusahaan telah menanyakan diri sendiri soalan yang salah apabila ia memutuskan bahawa pelantikan pihak menuntut kepada jawatan baru tersebut adalah betul, dibuat secara bona fide kesan daripada cadangan penyusunan semula tersebut tatkala tujuan-tujuan sedemikian adalah tidak relevan dari segi undang-undang.

Diputuskan:

(1) Adalah hanya satu kenyataan fakta oleh Mahkamah Perusahaan bahawa cabaran tersebut bukan kepada hak kontraktual syarikat tersebut untuk memindahkan pihak menuntut tetapi terhadap penugasan semula beliau sebagai seorang yang telah diturunkan pangkat dan diambil secara konteks adalah jelas tiada apapun yang tidak rasional (lihat ms 720A–B). Apa yang perlu diambilkira adalah bahawa Mahkamah Perusahaan telah mempertimbangkan persoalan penting di dalam kes ini — sama ada penugasan semula tersebut merupakan satu penurunan pangkat dan oleh demikian, di dalam keadaan kes ini, pihak menuntut telah dipecatkan secara konstruktif (lihat ms 720E).

(2) Mahkamah Perusahaan telah sampai ke satu penemuan fakta bahawa pihak menuntut hanya dikehendaki berhubung dengan pengurus besar selepas mendengar keterangan presiden syarikat tersebut yang telah menulis surat tersebut yang digunakan oleh pihak menuntut di dalam konteks keterangan yang lain. Di mana Mahkamah Perusahaan telah membuat penemuan fakta berdasarkan kebolehpercayaan saksi-saksi yang telah dilihat dan didengarinya, penemuan fakta-fakta sedemikian tidak boleh dipersoalkan di dalam kajian semula kehakiman tentang prosiding certiorari (lihat ms 721B–C).

(3) Fakta-fakta material Mahkamah Rayuan di dalam *Ang Beng Teik* dengan sendirinya tidak berkaitan dengan 'pemecatan konstruktif' tetapi berhubung dengan 'penamatan'. Kenyataan Mahkamah Rayuan tentang pemecatan konstruktif bukan sebenarnya merupakan sebahagian daripada ratio decidendi kes tersebut. Oleh demikian, Mahkamah Perusahaan dengan itu tidak boleh dikatakan telah 'menyalahtafsirkan ratio decidendi' dalam *Ang Beng Teik* (lihat ms 722A–C).

(4) Pihak menuntut sendiri telah mendakwa bahawa penugasan semula tersebut merupakan akibat daripada hilang keyakinan syarikat tersebut terhadap beliau. Beliau mendakwa bahawa beliau telah ditugaskan semula bukan kerana latihan penyusunan semula. Penemuan mahkamah bahawa pelantikan pihak menuntut kepada jawatan yang baru adalah betul, dibuat secara

bona fide sebagai kesan daripada cadangan penyusunan semula tersebut, merupakan jawapan kepada, dan memandangkan ia bukan menjadi persoalan, penemuan mahkamah yang tidak keluar dari penemuan utama bahawa pihak menuntut tidak diturunkan pangkat (lihat ms 722G–H).]

Notes

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) at paras 76–83.

For cases on employment generally, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 595–914

Cases referred to

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137 (refd)

Wong Chee Hong v Cathay Organization (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Council of Civil Service Union & Ors v Minister for Civil Service [1985] AC 374 (refd)

Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (refd)

Millbrook Furnishing Industries Ltd v Mc Intosh (1981) IRLR 309 (refd)

Legislation referred to

Industrial Relations Act 1967 s 33B

LG Seah (*Lobo & Associates*) for the applicant.
A Ramadass (*Ramadass & Associates*) for the respondent.

KC Vohrah J: The applicant ('the claimant') claimed constructive dismissal when he was re-assigned from his position as country manager to that as International Sales Force (ISF) area manager by the respondent ('the company') with effect from 24 January 1996. He claimed that the re-assignment was a demotion.

The re-assignment of his position was conveyed to the claimant by the company in a letter dated 23 January 1996. The claimant wrote a letter in reply requesting the re-assignment to be revoked on the ground that it was a demotion. The company wrote a letter to him dated 29 January 1996 which, inter alia, refuted the claimant's contention that he was demoted.

In the Industrial Court the court identified the sole issue as being 'whether the re-assignment of the claimant's job function to the new position amounts to a demotion from his post as general manager.'

The Industrial Court in its Award No 599 of 1997 held that the re-assignment of the position of the claimant as country manager to ISF area

A manager was not a demotion and that therefore the claim of constructive dismissal, which rested solely on the basis that he was demoted, failed.

It is established that the High Court when considering judicial review for the grant of certiorari does not act as a court of appeal. The court may exercise control by judicial review of administrative action on the ground of 'illegality', 'irrationality' or 'procedural impropriety' (see *Council of Civil Service Union & Ors v Minister for Civil Service* [1985] AC 374 and *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351).

In this case, I must firmly assert that this High Court does not sit as a court hearing an appeal from a subordinate court. This court sits mindful that the award of the Industrial Court as statutorily provided under s 33B of the Industrial Relations Act 1967 shall be final and conclusive and shall not be challenged, appealed against, reviewed or quashed or called in question in any court, save on the grounds I mentioned earlier. The court cannot disturb findings of facts unless there is 'irrationality' in the Tribunal coming to such findings of facts, 'irrationality' understood in the sense of 'Wednesbury unreasonableness' (see *Council of Civil Service Union* at pp 411 and 414). In the pithy language of that great legal jurist Abdoolcader SCJ in *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 at p 206:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision maker's jurisdiction, unless the decision maker has reached *absurd results or reached results absurdly.*

Using other language but with similar purport Abdoolcader SCJ at p 207 held the decision of the Industrial Court 'was clearly perverse and so devoid of plausible justification that no reasonable body of person could have reached it.'

Bearing these judicial pronouncements in mind, I approach the claimant's first ground for judicial review which is that the court was irrational in its finding when it held on the one hand that 'it is well settled that the employer has the prerogative to transfer the employer from one post to another, from one department to another, from one branch to another and from one company to another within the organisation' and yet on the other hand went on to state in the next paragraph that it is 'however pertinent to note that neither in the pleadings nor during the evidence did the claimant contend that the company did not have the contractual right to transfer him or to reassign him to different function...'

But whatever was stated by the Industrial Court, as has been pointed by counsel for the company, has to be viewed in the context of what the court further stated:

> It is also not the claimant's contention that he had been victimised or that the reassignment was *mala fide. His only complaint is that the re-assignment amounts to a demotion.* (Emphasis added.)

Counsel for the claimant argued that the term 'prerogative' as used by the Industrial Court refers to the *implied* rights of the employer to transfer his employees and it is therefore irrational for the court to state in the next paragraph that the claimant did not contend that the company did not have

a contractual right to transfer him or to reassign him to different functions. I frankly fail to see any merit in that argument. The claimant did not, in fact, challenge the contractual right of the company to transfer him. It was merely a statement of fact by the Industrial Court that the challenge was not to the contractual right of the company to transfer the claimant but to his re-assignment being a demotion and taken contextually there is clearly no irrationality at all.

The second ground is also predicated on alleged irrationality in that the court made an error of fact when it accepted that the claimant did not contend either in evidence or pleading that the company did not have the contractual right to transfer him when there was evidence contained in an exhibit (exh C-2) to show that. It was argued that there was irrationality as the Industrial Court had acted on 'an incorrect basis of fact' for holding that the applicant 'did not plead that the company had no contractual right to transfer or re-assign him to different function ...' when in fact the applicant in paras 3.1, 3.2, 3.3 and 3.4 of the amended statement of case and in the exhibits annexed thereto had challenged the company's re-assignment of his position to that of ISF area manager as amounting to a demotion.

To be noted is that in the amended statement of case, there is nothing contained within the body of the pleadings or in the evidence that the company had no contractual right to transfer him so the observation of the Industrial Court is an observation of fact. Transferability per se is not an issue in the case.

What matters is that the Industrial Court was seised of the pivotal issue in the case — whether the re-assignment was a demotion and therefore in the circumstances of the case the claimant was constructively dismissed — and the court did correctly address itself on the matters that are related to that issue. That brings me to the third ground of complaint.

The third ground is that the court had committed 'an error of fact' and had acted on an incorrect basis of fact when it held that the claimant was only told to 'liaise' with the general manager contrary to the documentary evidence adduced in the court which showed that the claimant was 'to report' to the general manager. In other words there was a demotion for him in the re-assigned post if he had to report to the new general manager and he himself was the general manager immediately before the re-assignment.

The documentary evidence (exh C-3) referred to has this passage on which the claimant relies:

> In line with our regional strategy to develop the regional markets, we will be organizing the Malaysian office to reflect this business decision. In view of that, we would like to confirm our offer to re-assign your job function to that of an ISF area manager for Malaysia with effect from 24 January 1996. Your prime responsibility is to focus on improving intra-regional sales for our non-core group of events in this region. You will report to Steven Thong, general manager on the day-to-day matters and you are to work closely with Monica Cheng on ISF related issues.

The second letter to the claimant by the company also mentioned 'you may be required' to report to Steven Thong 'on day to day matters, which are now a part of his job responsibilities ...'

A But as was pointed out by the counsel of the company and, I agree with the view, the Industrial Court had in fact addressed the said issue after hearing the evidence of the author of the abovesaid letter, ie one Mr Jimmy Lau, the president of the company, who was COW1 in the Industrial Court proceedings. He had testified at length on this issue and the Industrial Court having heard and assessed his evidence in the context of the other B evidence was convinced and came to a finding of fact that the claimant was only required to liaise with Mr Steven Thong in his new position and that his new position was not a demotion. The evidence of Mr Lau was backed by the evidence of the non-executive chairman of the company, Dr Mohd Tajuddin Mohd Jali, and showed that the claimant's re-assigned position C was separate and distinct from the general manager's position. It is clearly established in law that where the Industrial Court has made findings of facts based on the credibility of witnesses it saw and heard, such findings of facts cannot be impugned in the judicial review in certiorari proceedings. The third ground has no merit.

D The fourth ground advanced by the claimant is that the Industrial Court committed an error of law when it misconstrued the ratio decidendi in the case of *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137 on statutory unjust dismissal as opposed to common law constructive dismissal. In *Ang Beng Teck* reference was made to the Supreme Court case of *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 92. In *Wong Chee Hong*, Salleh Abas LP observed as follows at p 95:

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> Thus it is clear that even in England, 'constructive dismissal' does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no F more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expressions with the same meaning, such as 'implied dismissal' or even 'circumstantial dismissal' may well be coined and used. But all these could not go beyond the common law test.

Salleh Abas LP further stated:

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> When the Industrial court is dealing with a reference under s 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concept to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para (c) of H s 55(2) of the UK Protection of Employment Act 1978. Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word 'dismissal' in our section 20. We think that the word 'dismissal' in our section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the I contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v The Ottoman Bank* [1930] AC 271 and *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486.

According to the claimant, the Court of Appeal in *Ang Beng Teck* rejected the common law test and that the Industrial Court should have followed the ratio decidendi in *Ang Beng Teck*.

The material facts of the Court of Appeal in *Ang Beng Teck* themselves were not concerned with 'constructive dismissal' but with 'termination'. It was a case of an employee who upon being found guilty on various charges of misconduct was subsequently punished with a reduction in rank at work. Upon the meting out of the said punishment the employee refused to report for work but insisted that he be restored to his previous position. The employee in that case *did not walk out* on his employment claiming constructive dismissal. It was upon his refusal to report for work that he was subsequently terminated from his services by his employer. The employee then filed a complaint of unjust termination when he was so terminated. So when the matter arose before the Court of Appeal, the Court of Appeal clarified the point that the facts of the case were on termination by the employer and not on constructive dismissal. The Court of Appeal decided the dispute in favour of the employee thereby upholding the decision of the industrial court. The Court of Appeal held that the Industrial Court addressed itself to the right issue, not whether the employee's reduction in rank amounted to constructive dismissal but whether the termination of his services was with or without justification. The Court of Appeal's statements on constructive dismissal are not really part of the *ratio decidendi* of the case. Thus the Industrial Court therefore cannot be said to have 'misconstrued the *ratio decidendi*' of *Ang Beng Teck* as alleged by the claimant when *Ang Beng Teck* is not concerned with constructive dismissal.

I again see no merit on the ground advanced.

As regards the fifth ground, it is that the Industrial Court had asked itself the wrong question when it held that 'the court is of the considered opinion that the designation of the claimant to the new post was proper, done bona fide as a result of a proposed reorganisation ...' when 'such intentions are irrelevant at law.' In argument the case of the UK Employment Appeal Tribunal, *Millbrook Furnishing Industries Ltd v Mc Intosh* (1981) IRLR 309 was relied upon.

It has to be noted that the claimant himself did allege that the re-assignment was as a result of the company's loss of confidence in him. In other words he was reassigned not because there was a reorganisation exercise. The court's finding was an answer to that and while it was not in issue the court's finding did not detract from the central finding that the claimant was not demoted.

The application of the claimant is dismissed with costs.

Application dismissed.

Reported by Benjamin Yong